Hasran bin Mohmed Yusof (as the administrator of the estate of Zakaria bin Abdul Raof, deceased) v Tian Siang Orchard Sdn Bhd

A

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(NCVC)(W)-1809–10 OF 2014
ABANG ISKANDAR, VARGHESE GEORGE AND NALLINI PATHMANATHAN JJCA
9 AUGUST 2016

C

Civil Procedure — Further evidence — Leave to adduce — Respondent obtained consent order for cancellation of 'Malay reserve land' indorsement on land — Respondent sought to introduce consent order pursuant to s 69(3) of the Courts of Judicature Act 1964 — Whether r 7(3A) of the Rules of the Court of Appeal 1994 satisfied — Courts of Judicature Act 1964 s 69(3) — Rules of the Court of Appeal 1994 r 7(3A)

D

Land Law — Sale of land — Agreement — Land owned by deceased sold to third party ('first agreement') — Third party sold land to respondent ('second agreement') — Whether land was Malay reserved land — Whether trial judge correct in accepting evidence of respondent's witness to established that land was not Malay reserved land — Whether respondent had rights to occupy and use land

E

F

The appellant was the current administrator of the estate of Zakaria bin Abdul Raof ('the deceased') who was the registered owner of 1/4 undivided share interest in a land situated in Daerah Larut and Matang, Perak ('the land'). The previous administrator of estate of the deceased had entered into agreement with one Ching Sia Tion ('CST') on 10 May 1982 ('the 1982 agreement') to sell the deceased's undivided share interest on the land to CST. CST purchased the land on behalf of a company known as Padang Gajah Orchard Sdn Bhd ('PGOSB'). Part of the purchase price had been paid by CST and the balance was to be paid upon the vendor receiving necessary consents or orders from the court approving the sale of the land. In 1994, the land was sold to the respondent ('the 1994 agreement'). The appellant then commenced action against the respondent claiming that the 1982 agreement was null and void; the appellant had not consented to the 1994 agreement; and all proceeds from the land to be accounted for the estate. The learned trial judge found the 1982 agreement was valid and dismissed the action, hence this appeal. In the present appeal, the respondent had also made an application to adduce fresh evidence pursuant to s 69(3) of the Courts of Judicature Act 1964 ('encl 6'). The evidence that the respondent sought to adduce was the consent order obtained by the respondent against the Pengarah Tanah dan Galian, Perak and the

G

H

I

Pendaftar Tanah, Pejabat Daerah dan Tanah Larut Matang dan Selama, Perak for them to cancel the 'Tanah Simpanan Melayu' indorsement on the land. The issues for determination in the present appeal were: (a) whether the learned trial judge was correct in accepting the evidence of the 'Ketua Pendaftaran, Jabatan Ukur dan Pemetaan, Perak ('SD3') as being sufficient to establish the status of the land, namely that it was not a Malay reserved land; and (b) on the possession or use of the land by the respondent.

Held, dismissing the appeal and affirming the decision of the High Court with costs of RM15,000:

(1) The court was satisfied that both limbs of r 7(3A) of the Rules of the Court of Appeal 1994 had been fulfilled and granted leave to the respondent to introduce the consent order as fresh evidence in the present appeal. The consent order was a new piece of evidence relevant to the subject matter on appeal which had come to existence after and subsequent to the judgment in this appeal. Without a doubt, it was related to matters in issue and would have had a determining influence on the outcome of the case at the trial stage and in the present appeal (see paras 29 & 31).

(2) SD3 gave detailed testimony as to the processes involved and the steps to be followed to validly designate any land as a Malay reserved land. This was sufficient in itself to discharge the onus of proof placed on the respondent and/or to even rebut any presumption that was open to the court under s 114(e) of the Evidence Act 1950. The learned trial judge did not therefore err in wholly relying on the evidence of SD3, albeit, that he was the Ketua Pendaftaran at the Jabatan Ukur dan Pemetaan Perak (see para 37).

(3) By the terms of the 1982 agreement, CST and/or PGOSB could enter upon the land and exploit it and there was no express prohibition or restriction in passing that interest or possession in the land to any other. The fact was established in evidence that the appellant knew of and had acknowledged always the respondent's rights to the use and possession of the land since 1994. The respondent had carried on with the oil palm plantation on the land and had expended their own funds to improve the same, thus they had clearly established their equitable right to occupy and use the land. Further, the appellant was estopped from denying the respondent's right to occupy and use the land as the appellant did not take any proceedings either to evict and nor did they assert any claim for the income derived from the land against the respondent from the time of the 1994 agreement or even after 1999 when the appellant handed the quit rent notices to be paid by the respondent (see paras 43 & 45–46).

[Bahasa Malaysia summary

Perayu adalah pentadbir semasa bagi harta pusaka Zakaria bin Abdul Raof ('si mati') yang merupakan pemilik berdaftar 1/4 kepentingan saham yang tidak berbelah bahagi dalam tanah yang terletak dalam Daerah Larut dan Matang, Perak ('tanah'). Pentadbir harta pusaka si mati terdahulu telah memasuki perjanjian dengan Ching Sia Tion ('CST') pada 10 Mei 1982 ('perjanjian 1982') untuk menjual kepentingan saham yang tidak berbelah bahagi si mati ke atas tanah tersebut kepada CST. CST membeli tanah tersebut bagi pihak syarikat yang dikenali sebagai Padang Gajah Orchard Sdn Bhd ('PGOSB'). Sebahagian daripada harga belian telah dibayar oleh CST dan bakinya pula akan dibayar kepada penjual yang menerima kebenaran yang diperlukan atau perintah daripada mahkamah yang meluluskan penjualan tanah tersebut. Pada tahun 1994, tanah tersebut dijual kepada responden ('perjanjian 1994'). Perayu kemudiannya memulakan tindakan terhadap responden mendakwa bahawa perjanjian 1982 adalah tidak sah dan terbatal; perayu tidak bersetuju dengan perjanjian 1994; dan semua hasil daripada tanah akan dikira untuk harta pusaka. Hakim perbicaraan mendapati perjanjian 1982 adalah sah dan menolak tindakan tersebut, oleh itu rayuan ini dibuat. Dalam rayuan ini, responden juga telah membuat permohonan untuk mengemukakan keterangan baru menurut s 69(3) Akta Mahkamah Kehakiman 1964 ('lampiran 6'). Keterangan bahawa responden dituntut untuk mengemukakan adalah perintah persetujuan yang diperolehi oleh responden terhadap Pengarah Tanah dan Galian, Perak dan Pendaftar Tanah, Pejabat Daerah dan Tanah Larut Matang dan Selama, Perak agar mereka membatalkan pengendorsan 'Tanah Simpanan Melayu' ke atas tanah tersebut. Isu-isu untuk ditentukan dalam rayuan ini ialah: (a) sama ada hakim perbicaraan bertindak tepat dalam menerima keterangan berhubung 'Ketua Pendaftaran, Jabatan Ukur dan Pemetaan, Perak ('SD3') sebagai mencukupi untuk membuktikan status tanah, iaitu bahawa tanah tersebut bukannya satu tanah Rizab Melayu; dan (b) mengenai pemilikan atau penggunaan tanah tersebut oleh responden.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi dengan kos sebanyak RM15,000:

(1) Mahkamah berpuas hati bahawa kedua-dua bahagian k 7(3A), Kaedah-Kaedah Mahkamah Rayuan 1994 telah dipenuhi dan memberikan kebenaran kepada responden untuk memperkenalkan perintah persetujuan sebagai keterangan baru dalam rayuan ini. Perintah persetujuan adalah satu keterangan baru yang berkaitan dengan perkara subjek semasa rayuan yang wujud selepas dan sehubungan dengan penghakiman dalam rayuan ini. Tanpa syak lagi, perintah tersebut berkaitan dengan perkara yang menjadi isu dan mempunyai pengaruh yang menentukan keputusan kes di peringkat perbicaraan dan rayuan ini (lihat perenggan 29 & 31).

(2) SD3 memberi keterangan terperinci mengenai proses-proses yang terlibat dan langkah-langkah yang perlu diikuti untuk secara sah menetapkan mana-mana tanah sebagai tanah rizab Melayu. Ini adalah dengan sendirinya mencukupi untuk melepaskan tanggungjawab pembuktian diletakkan ke atas responden dan/atau malahan untuk menangkis apa-apa anggapan yang terbuka kepada mahkamah di bawah s 114(e) Akta Keterangan 1950. Hakim perbicaraan oleh itu tidak terkhilaf dengan bergantung sepenuhnya kepada keterangan SD3, walaupun, beliau ialah Ketua Pendaftaran di Jabatan Ukur dan Pemetaan Perak (lihat perenggan 37).

(3) Melalui terma-terma perjanjian 1982, CST dan/atau PGOSB boleh memasuki tanah tersebut dan mengeksploitasinya dan tiada larangan nyata atau sekatan dalam melepaskan kepentingan atau pemilikan tanah tersebut kepada yang lain. Fakta yang dibuktikan dalam keterangan bahawa perayu tahu dan sentiasa mengakui hak responden untuk penggunaan dan pemilikan tanah sejak tahun 1994. Responden telah menjalankan penanaman kelapa sawit di tanah tersebut dan telah membelanjakan dana mereka sendiri untuk meningkatkan penanaman tersebut, dengan itu mereka telah membuktikan dengan jelas hak ekuiti mereka untuk menduduki dan menggunakan tanah. Seterusnya, perayu diestop daripada menafikan hak responden untuk menduduki dan menggunakan tanah tersebut memandangkan perayu tidak mengambil apa-apa prosiding sama ada untuk mengusir mahupun mereka tidak menuntut apa-apa tuntutan untuk pendapatan yang diperoleh daripada tanah tersebut terhadap responden sejak perjanjian 1994 atau walaupun selepas 1999 apabila perayu menyerahkan notis cukai tanah yang perlu dibayar oleh responden (lihat perenggan 43 & 45–46).]

Notes

For a case on leave to adduce, see 2(2) *Mallal's Digest* (5th Ed, 2015) para 3635.
For cases on agreement, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 4825–4828.

Cases referred to

Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor [1995] 2 MLJ 276, HC (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69(3)
Evidence Act 1950 ss 101, 102, 114, 114(e), (g)
Malay Reservation Enactment 1933 s 3
Rules of the Court of Appeal 1994 r 7(3A)

Appeal from: Suit No 22NCVC-142–09 of 2013 (High Court, Ipoh)

Paari Perumal (KA Ch'ng with her) (Chai & Partners) for the appellant.
Thomas Su Keong Siong (CK Leong & Co) for the respondent.

Varghese George JCA:

INTRODUCTION

[1] The Ipoh High Court after a full trial had on 29 September 2014 dismissed both the appellant/plaintiff's claim and the respondent/defendant's counterclaim in Civil Appeal No 22NCVC-142–09 of 2013. Only the appellant/plaintiff appealed against that decision.

[2] After having heard counsel for the respective parties we had on 14 April 2015 dismissed the appeal. We now set out the grounds for our decision.

[3] The parties will be referred to here as they were at the High Court.

BACKGROUND

[4] The plaintiff was the current administrator of the estate of Zakaria bin Abdul Raof ('ZAR'), the deceased.

[5] The action involved the registered percentage undivided share interest of ZAR in land held presently under five title documents, namely GM 2224, GM 2225, GM 2226, GM 2227 and GM 2228 (previously EMR 2826, EMR 2827, EMR 2828, EMR 2829 and EMR 2830) for Lots 827, 829, 832, 833 and 836, all in the Mukim of Sungei Tinggi, Daerah Larut & Matang, Negeri Perak ('the land').

[6] Previous administrators of ZAR's estate had on 10 May 1982, entered into an agreement ('1982 agreement') with Ching Sia Tiong ('CST') to dispose of ZAR's interest in the land to CST. The other co-proprietors having interest in the land were also parties to the same agreement to similarly sell all their respective undivided shares in the land to CST.

[7] The total consideration for the overall purchase of the land was stated to be RM441,626. It was not in dispute that a total sum of RM220,813 had been paid to the co-proprietors and, from that sum, the ZAR's estate had received the proportionate portion of that part payment of purchase price as was due to the estate.

[8] The 1982 agreement, inter alia, contained the following:

(a) Recital (3)
(3) The Purchaser is purchasing the property for and on behalf of a company which he intends to incorporate by the name of *PADANG GAJAH ORCHARD SDN. BHD.* or by whatever name as shall be approved by the Registrar of Companies (hereinafter referred to as 'the Company'), and the Purchaser upon incorporation of the company will cause the company to adopt this Agreement so that upon completion of this Agreement the said property will be transferred directly to the company.

(b) Recital (4)
(4) The Vendors will be applying for and will obtain all necessary consents or orders of the court to approve the sale of the property as provided for in this Agreement.

(c) Clause 2.1(b)
2.1.Payment of balance of purchase price
The balance of purchase price ...

(d) ...

(e) and the final balance of Ringgit Two Hundred and Twenty Thousand, Eight Hundred and Thirteen ($220,813.00) only shall be paid not later than twelve (12) months from the date of this execution of this Agreement or upon the expiry of a 30 days' notice being given by the Vendors to the Purchaser that the necessary consents or orders of the court approving the sale as provided for in this Agreement has been obtained, whichever shall be later.'

(a) Clause 7.1
7.1.Court Order
The Vendors do hereby covenant and undertake to apply for and obtain all necessary consents and orders of the court, and do all other things as shall be necessary for obtaining the same, in approving the sale of the said property to the Purchaser as provided for in this Agreement. In the event that the Vendors shall fail to do so, all monies received by the Vendors shall be refunded to the Purchaser free of any interest, whereupon this Agreement shall forthwith terminate and cease to be of any further effect.

(b) Clause 8.1
8.1.Delivery of vacant possession and authority to carry out works
Vacant possession of the said Property shall be delivered by the Vendors to the Purchaser within one (1) calendar month from date of receipt of the sum as mentioned in Clause 1.1. herein. Together with the aforesaid vacant possession, the Vendors shall allow the Purchaser to enter on to the said property with full authority to carry out replanting works and other projects related thereto at the Purchaser's own costs, and all incomes earned or derived from such works or projects and including all subsidies or grants provided by the relevant authorities for such works or projects shall accrue absolutely to the Purchaser. PROVIDED ALWAYS that the authority herein given to the Purchaser to enter on the said property and

> to carry out works and projects as aforesaid shall terminate and cease forthwith and all incomes and other receivables accruing therefrom shall forthwith cease to be payable to the Purchaser upon the Purchaser's default to complete the purchase as stipulated in Clause 2.1 herein, whereupon the Purchaser shall forthwith vacate and deliver up possession of the said property to the Vendors.

[9] Padang Gajah Orchard Sdn Bhd ('PGOSB') was incorporated on 15June 1982. The co-proprietors of the land had, pursuant to cl 8.1 (delivery of vacant possession and authority to carry out works) of the 1982 agreement, allowed CST and/or PGOSB to enter upon and take vacant possession of the land. PGOSB had continued to be in occupation and had developed the land into an oil palm plantation without any objection or protest by any of the co-proprietors including the administrators of ZAR's estate.

[10] PGOSB (describing itself as the 'beneficiary owner' of the land) had then on 1 February 1994 entered into an agreement with the defendant ('the 1994 agreement') to sell to the defendant, PGOSB's interest in the land for a consideration stated to be RM443,926. Of this sum, only a part was paid. It was however provided at cl 2.1 of the 1994 agreement that the balance of purchase price amounting to RM220,813 '... shall be paid by the Purchaser to the registered landowners' (the 'purchaser' referred to the defendant).

[11] Since 1994 the defendant had occupied and continued with the oil palm cultivation on the land. All annual quit rents levied in respect of the land were paid by the defendant. In 1996, and again in 2010, there were TNB acquisitions involving certain parts of the land and the defendant had received the two compensation payments thereto (amounting to a total of RM478,580) without protest from any of the co-proprietors including the administrators of ZAR's estate.

[12] The defendant had also on 11 April 2008 filed a private caveat to protect their interest in the land.

[13] The plaintiff in this action commenced in 2013, asserted that:

(a) the 1982 agreement was null and void and/or no longer had any legal effect or was binding on the estate;

(b) the estate had no knowledge of and in any event had not consented to the sale of the land by PGOSB to the defendant in 1994; and

(c) all proceeds derived from the land, including the compensation received from TNB, should be accounted for and paid over by the defendant to the estate.

[14] The plaintiff's case was premised on the claim that the land had always been a Malay reserve land and could not therefore be sold or transferred to CST, being a non-Malay. In furtherance of this contention the plaintiff relied solely on the endorsement 'TANAH SIMPANAN MELAYU' which was found on all the five *Geran Mukim* which, as it transpired, had been issued in 1996 in replacement of the EMR documents of title in respect of the land. It was contended that any transaction with intention to divest the ownership of a Malay reserve land to a non-Malay was void and in contravention of the Malay Reservation Enactment 1933 (FMS Cap 142) ('the Enactment').

[15] It was also the plaintiff's contention that, in any event, that since such portion of the balance of the purchase price due to the estate for its percentage share in the land had remained unpaid all this time since 1982, the estate was no longer bound to any contract (if at all existent) by reason of the breach of the terms of the 1982 agreement by CST, PGOSB or any other purchaser or occupier of the land.

[16] The defendant's case however was that the land was never at the time of 1982 agreement or at any time thereafter a validly *gazetted* Malay reserve land. It was contended that there appeared to be an administrative error in the endorsement now found in the replacement *Geran Mukim* documents of title when the original *EMR* documents of title in respect of the five lots comprised in the land, did not carry any such restriction in interest or endorsement at all.

[17] It was also the defendant's defence that the balance of the agreed purchase price (or such portion as were due to ZAR's estate) under the 1982 agreement by the express terms of that contract therein was not due for payment as yet. Such sum was only required to be paid before the expiry of a contemplated 30 days' notice to be issued by the co-proprietors that all necessary consents or orders of the court approving the sale had been obtained by the co-proprietors (as vendors). The estate had not given any notice that they had duly obtained such required consent or order of the court (cl 2.1).

[18] The defendant also maintained that the estate had all along since 1994 been aware and had acknowledged the interest of PGOSB. and subsequently that of the defendant, in the land traceable directly to the terms of the 1982 agreement between the administrators of ZAR's estate and CST. Neither had the plaintiff to date applied to remove the caveat entered by the defendant on the land.

[19] In their counterclaim the defendant in the main sought for a declaration that the 1982 agreement was valid and enforceable, and also for consequential orders that there be specific performance of the terms of that agreement by the plaintiff.

THE HIGH COURT

[20] By agreement of the parties only the issue of 'liability' was initially up for determination by the court. The learned trial judge identified the issues that were before the court as follows:

(a) whether the 1982 agreement was validly made and in force; and

(b) whether the 1992 agreement was valid, in force and binding on the plaintiff.

[21] As the documents of title (namely, the *Geran Mukims)* produced in court bore the endorsement 'TANAH SIMPANAN MELAYU', and it was the defendant who was contesting this fact, the learned trial judge took the position that the onus to prove that the land was not a Malay reserve land shifted onto the defendant, pursuant to accepted evidentiary principles of law (ss 101–102 of the Evidence Act 1950) ('the EA').

[22] The learned trial judge analysed the evidence led before the court and accepted the testimony of the defendant's witness, Abdul Aziz bin Sahry ('SD3'), the Ketua Pendaftaran, Jabatan Ukur and Pemetaaan, Perak that the land was not at any time a 'Tanah Simpanan Melayu' according to the records at this witness's department, notwithstanding that ex facie the replacement GMs carried that endorsement. The learned trial judge accordingly rejected the plaintiff's contention and proceeded to hold that the land at the time of the execution of the 1982 agreement and also at the time of the 1994 agreement was never a Malay reserve land.

[23] With respect to the 1982 agreement, the court noted that:

(a) the plaintiff did not in their pleadings deny the existence of that agreement;

(b) the terms of the agreement, particularly recital 3 clearly stated that the land was being purchased by CST for PGOSB and therefore PGOSB as the beneficial owner was entitled to dispose their interest in the land to the defendant;

(c) the terms of the agreement required consents and order of court to be obtained by the co-proprietors of the land (vendors) and since no such consent or order of court had been produced or any notice thereto issued, no obligation to pay ZAR's estate the balance of purchase price had arisen;

(d) cl 7 of the agreement provided an avenue for the agreement to be terminated if the required consents and order of court were not secured by the co-proprietors but this had not been invoked to date; and

(e) as the agreement had not been terminated the contract therein remained valid and still to be completed (that is, the contract remained still executory in nature).

[24] With regard to the 1994 agreement the learned trial judge, whilst noting again that CST in entering into the 1982 agreement was expressly acting for or as a representative of PGOSB (and accordingly PGOSB was rightfully entitled to the benefit of the terms of the 1982 agreement), held that no notice of the subsequent 1994 agreement entered into between PGOSB and the defendant (which was in the nature of an assignment of a 'chose in action' as His Lordship ruled), had however been given to the plaintiff. There was therefore no privity of contract between the plaintiff and the defendant. The *defendant* could not therefore rely on the 1994 agreement to seek specific performance by the plaintiff of the 1982 agreement.

ENCLOSURE 6(a)

[25] Before we dealt with the appeal proper, we heard and disposed a *notis usul* filed by the defendant, namely encl 6(a). This was an application under s 69(3) of the Courts of Judicature Act 1964 to adduce a fresh piece of evidence, namely a consent judgment that had been entered on *12 December 2014* in Ipoh High Court Originating Summons No 24NCVC-472–10 of 2014 ('OS 472–10 of 2014').

[26] OS 472-10/2014 had been filed by the defendant on 27 October 2014 after the decision in the current suit under appeal had been delivered (29 September 2014). The defendant in OS 472–10 of 2014 had cited the Pengarah Tanah dan Galian, Perak and the Pendaftar Tanah, Pejabat Daerah dan Tanah Larut Matang dan Selama, Perak, as defendants. OS 472–10 of 2014 applied for an order:

> ... bahawa *memorial ataupun indorsmen 'Tanah Simpanan Melayu'*di atas Suratan-suratan Hakmilik untuk tanah yang dipegang di bawah Geran Mukim 2224, Lot No. 827; Geran Mukim No. 2225, Lot No. 829, Geran Mukim No. 2226, Lot No. 832; Geran Mukim No. 2227, Lot No. 833 dan Geran Mukim No. 2228, Lot No. 836 kesemuanya di dalam Mukim Sungai Tinggi, Daerah Larut & Matang, Negeri Perak Darul Ridzuan (hartanah tersebut) *hendaklah dibatalkan dan/atau dimansuhkan atas alasan bahawa memorial dan/atau pengindorsan 'Tanah Simpanan Melayu' tersebut adalah dibuat dengan cara suatu instrument yang tidak mencukupi atau tak sah.*

[27] The consent order entered on 12 December 2014 in OS 472–10 of 2014 was in terms of the order applied for by the defendant.

[28] Enclosure 6(a) was opposed by the plaintiff (appellant) who submitted

that the threshold requirement under r 7(3A) of the Rules of the Court of Appeal 1994 ('the RCOA') had not been fulfilled. The main contention of the plaintiff was that the Pendaftar Tanah, Daerah Larut Matang and Selama had been listed as a witness to be called by the defendant in the suit under appeal but the defendant had closed their case without calling that witness; this evidence sought now to be introduced at the appeal stage was available to the defendant and reasonable diligence would have required it to be produced at the hearing of the suit under appeal.

[29] We did not agree with the plaintiff and proceeded to grant leave to the defendant to introduce the consent order as fresh evidence in this appeal. We were satisfied that both limbs of r 7(3A) of the RCOA had been satisfied.

[30] In our minds, there existed a valid distinction that had to be drawn between the availability and calling of witnesses on the one hand *and* the introduction of a subsequently obtained consent order, on the other hand. They were entirely two separate matters.

[31] The consent orders in OS 472–10 of 2014 was a new piece of evidence relevant to the subject matter on appeal which had come into existence after and subsequent to the judgment in the appeal before us. Without a doubt, it is related to matters in issue and would have had a determining influence on the outcome of the case at the trial stage and in the appeal before us.

THE APPEAL

[32] Having heard counsel for the respective parties, it was our considered view there was sufficient evidence before the learned trial judge to support the conclusion reached by the court that the land was not a Malay reserve land in 1982, or in 1994 or at the time of the trial.

[33] The issue revolved around the question whether the learned trial judge was correct in accepting SD3's evidence as being sufficient to establish the status of the land, namely that it was not a Malay reserve land. The plaintiff's contention was that this could only have been conclusively confirmed by the Pentadbir Tanah Daerah and this material witness had not been called by the defendant.

[34] The plaintiff's argument before us was two-fold, namely:

(a) the presumption of regularity of official acts as provided in s 114, Illustration (e) of the EA should have been invoked by the court, in so far as the *Geran Mukims* and what was expressed thereon were being challenged; and

(b) the presumption of adverse inference under s 114 Illustration (g) of the EA should have been applied by the court upon the failure of the defendant to call the Pentadbir Tanah Daerah as a witness at the trial.

[35] The material provision of s 114 of the EA are as follows:

114 Court may presume existence of certain fact.

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in relation to the facts of the particular case.

ILLUSTRATIONS

The court may presume —

...

...

...

(e) the judicial and official acts have been regularly performed;

...

(g) the evidence which could be and is not produced would if produced be unfavourable to the person who withhold it;

...

...

But the court shall also have regard to such facts as the following in considering whether the maxims do or do not apply to the particular case before it:

...

...

[36] It was trite that the enabling presumptions outlined in the illustrations to s 114 of the EA were rebuttable presumptions of facts leaving it upon the judge to decide (discretionary not mandatory) whether to invoke the same or not depending on the circumstances of each particular case including the nature of the fact, the existence or absence of which. had to be proved before the court. It only meant that certain facts were eminently reasonable to presume in particular situations. Those presumptions were not an inflexible rule and, according to authorities, only to be resorted to if they were strictly necessary to meet the ends of justice, (see *Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor* [1995] 2 MLJ 276 (HC); *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 (FC)).

[37] SD3 gave detailed testimony as to the processes involved and the steps to be followed to validly designate any land as a Malay reserve land. This in our considered view was sufficient in itself to discharge the onus of proof placed on the defendant and/or to even rebut any presumption that was open to the court under s 114 Illustration (e) of the EA. The learned trial judge did not therefore err in wholly relying on the evidence of SD3, albeit, that he was the Ketua Pendaftaran at the Jabatan Ukur dan Pemetaan Perak.

[38] The material part of the evidence in chief of SD3 (witness statement Q/A 3, 4, 5 and 6) were as follows:

3. Adakah maklumat hartanah yang dikenali sebagai Geran Mukim No. 2224, Lot No. 827; Geran Mukim No. 2225, Lot No. 829; Geran Mukim No. 2226, Lot No. 832; Geran Mukim No. 2227, Lot No. 833 dan Geran Mukim No. 2228, Lot No. 836 kesemuanya di dalam Mukim Sungai Tinggi, Daerah Larut & Matang, Negeri Perak [selepas ini dirujuk secara kolektif sebagai 'hartanah tersebut'] ada terkandung di dalam peta-peta tersebut?

J: Kesemua lot-lot yang dinyatakan adalah berada di dalam Mukim Sungai Tinggi tetapi ianya tidak terkandung di dalam CP 52023 dan CP 52024. Pelam Akui sebenar bagi kesemua lot tersebut di atas adalah terkandung di dalam Demarcation Sheet (DM) No. 59 dan 60.

4. Sila beritahu kepada Mahkamah Yang Mulia ini tentang prosedur yang melibatkan dan/atau tindakan yang perlu diambil oleh Jabatan Ukur dan Pemetaan dalam suatu proses penukaran status sesuatu kawasan tanah kepada status 'Tanah Simpanan Melayu' oleh pihak Berkuasa Negeri?

J: Dalam satu-satu proses penukaran status 'Tanah Simpanan Melayu', Permohonan Ukur (PU) perlulah diterima terlebh dahulu daripada Pejabat Tanah dan Daerah yang berkaitan setelah diluluskan oleh Majlis Mesyuarat Kerajaan (MMK). Jabatan ini hanya perlu menyediakan Pelan Warta yang diluluskan oleh Pengarah Ukur dan Pemetaan berdasarkan kepada pelan PU tersebut bagi tujuan pewartaan. Draf pewartaan akan disediakan oleh Pentadbir Tanah Daerah berkaitan dan seterusnya dikemukakan kepada Pengarah Tanah da Galian Perak sebelum dihantar kepada Pejabat Penasihat Undang-Undang Negeri untuk tujuan pewartaan. Jabatan ini akan menyimpan rekod Pelan Warta tersebut bagi tujuan semakan di masa akan datang.

5. Daripada rekod di Jabatan Tuan, adakah pihak Jabatan Ukur dan Pemetaan Perak pernah dan/atau telah menerima sebarang pemberitahu dan/atau warta bahawa status kawasan hartanah tersebut telah ditukarkan pada status 'Tanah Simpanan Melayu'?

J: Berdasarkan rekod, Jabatan ini tidak pernah menerima sebarang pemberitahuan kawasan hartanah yang dinyatakan ditukarkan kepada status 'Tanah Simpanan Melayu'.

6. Adakah ia satu kehendak dan/atau keperluan mandatori untuk Jabatan Ukur dan Pemetaan dimaklumkan oleh Pihak Berkuasa Negeri tentang pewartaan dan/atau perizaban sesuatu kawasan tanah kepada status 'Tanah Simpanan Melayu'?

J: Ia semestinya dimaklumkan kepada Jabatan ini sekiranya Pelan Warta perlu disediakan dan diluluskan oleh Pengarah Ukur dan Pemetaan bagi tujuan membuat pewartaan.

[39] Under cross-examination, the witness said as follows:

Peguam:	Boleh Encik Abdul Aziz sahkan bahwa mengikut rekod geran tanah ini tanah ini adalah tanah simpanan melayu. Mengikut rekod geran tanah ini.
Saksi:	Berdasarkan rekod jabatan ini setelah siasatan kita memang.
Peguam:	No, no. My question is Encik Abdul Aziz, sila lihat geran tanah ini mengikut rekod geran tanah ini adakah tanah ini dikatakan sebagai tanah simpanan melayu?
Saksi:	Saya pun tidak boleh jawab sebab ini.
Peguam:	Sila lihat muka surat pertama.
Saksi:	Kalau ikut tulisan itu memang betul lah. Ya.
Peguam:	So kamu sahkan mengikut rekod atas geran tanah ini tanah ini adalah tanah simpanan melayu. Betul?
Saksi:	Ya.
Peguam:	Dan kamu tadi telah mengesahkan jika ada apa-apa yang perlu dikatakan mengenai geran tanah ini hanya pentadbir tanah yang boleh berbuat demikian. Benar?

Upon re-examination SD3 however testified firmly that the land was not *Tanah Simpanan Melayu* based on the research in his department.

Peguam:	Dengan izin Yang Arif. Hanya satu soalan semula. Encik Aziz, tadi telah ditunjukkan geran tanah tersebut dan ditanya dan direkod yang ini adalah tanah simpanan melayu. Soalan semula saya adakah di Jabatan Ukur dan Pemetaan encik boleh sahkan atau tidak boleh sahkan perkara ini.
Saksi:	Okay, Yang Arif, berdasarkan rekod jabatan ukur setelah siasatan kita memang sahkan ini bukan tanah simpanan melayu.

[40] It must be pointed out that whatever seeming concession by SD3 pounced upon by counsel for the plaintiff in argument as being in the plaintiff's favour, related only to what was *ex facie* visible as endorsed on those title documents. Significantly, this witness's testimony that the due processes to validly invest the land with the status of a Malay reserve land was not complied with, remained unchallenged or otherwise negated by the plaintiff.

[41] We also noted the following, namely: A

(a) the 1982 agreement (admitted in its entirety by the plaintiff) did not anywhere state that the land was a Malay reserve land;

(b) certain of the other co-proprietors of the land from whom CST had contracted to purchase the interest in the land) were non-Malay parties in so far as the EMR and now the GM records showed; this could not have been the case if the land was indeed a Malay reserve land; and B

(c) no evidence was led by the plaintiff to show that the land had at any point or even subsequent to1982 been duly *gazetted* as a Tanah Simpanan Melayu, as required by s 3 of the Enactment. C

[42] The learned trial judge's finding based on the material before the court was now vindicated further by the terms of the consent judgment of 12 December 2014 in OS 472–10 of 2014 where the relevant land authorities D have confirmed and acknowledged that the endorsement/memorial found on the GMs, namely, 'Tanah Simpanan Melayu', had been effected without sufficient instrument or otherwise validly in law and this endorsement of a restriction in interest would be accordingly expunged from the records. The Pengarah Tanah dan Galian Perak and the Pendaftar Tanah Daerah were E defendants in OS 472–10 of 2014.

[43] The next issue was to as the possession or use of the land by the defendant. It was undeniable that by the terms of the 1982 agreement CST and/or PGOSB could enter upon the land and exploit it, notwithstanding that F the balance of purchase price had not been fully settled, (see cl 8.1 read with cl 1.1 set out above). What need to be highlighted was the fact that in the 1982 agreement there was no express prohibition or restriction in passing that interest or possession in the land to any other. It was also not disputed that certain of the envisaged consent and relevant order(s) from the court had not G been obtained by the concerned co-proprietors of the land, including ZAR's estate, and this was the reason why the intended completion and perfection of the formal transfer of the whole of the land to CST or PGOSB had been prevented to be effected in law.

H

[44] As rightfully noted by the learned trial judge the 'chose in action' or interest in the land vested in CST and/or PGOSB pursuant to the terms of the 1982 agreement was an assignable interest at all time. In the particular context of the facts in this case, it was only the non-notification of the execution of the subsequent 1994 agreement by PGOSB with the defendant however that led I the learned trial judge to hold that the defendant could not succeed on their claim for an order or specific performance against the plaintiff.

[45] Notwithstanding that lack of notice, the fact was established in

evidence that the plaintiff knew of and had acknowledged always the defendant's rights to the use and possession of the land since 1994. The direct payment of the TNB compensation to the defendant without any protest by the plaintiff was one such piece of evidence. One other documentary evidence of similar effect was a letter dated *15 April 1999* from 'Ladang Abdul Raof' to the defendant forwarding the quit rent notices for the five *GM* lots of the land to be duly settled with the authorities by the defendant.

[46] The defendant clearly had established their equitable right to occupy and use the land; the defendant had carried on with the oil palm plantation and had expended their own funds to improve the same. This was further supported and evidenced by the private caveat lodged by the defendant and which remained in respect of the land, without any challenge by ZAR's estate. The plaintiff did not take any proceedings either to evict and nor did they assert any claim for the proceeds or income derived from the land by the defendant from the time of the 1994 ('the 1994 agreement') or even after 1999 (when the plaintiff handed the quit rent notices to be paid by the defendant). The plaintiff was therefore estopped now from denying the defendant's right to occupy and use the land.

[47] Understandably the plaintiff was left with only one ground to invalidate the 1982 agreement (or the subsequent vesting of rights over the land in the defendant), namely, the contention that the intended original sale transaction involved a transfer of a Malay reserve land to a non-Malay interest. As shown above this was rejected by the learned trial judge, and rightly so in our view, as discussed and elaborated above by us. We therefore did not find any appealable error on the part of the learned trial judge which warranted our appellate intervention.

[48] The decision of the learned trial judge was not plainly wrong on the entirety of the evidence before the court or on the specific issue as regards the actual status of the land, namely, that it was not a Malay reserve land. We therefore unanimously dismissed the appeal and affirmed the decision of the High Court.

[49] We further ordered a sum of RM15,000 as costs to the defendant (the respondent).

Appeal dismissed and decision of High Court affirmed with costs of RM15,000.

Reported by Dzulqarnain Ab Fatar